



POLICE DEPARTMENT CITY OF NEW YORK

April 26, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Jacob Newman
Tax Registry No. 933090
46 Precinct
Disciplinary Case No. 2016-16298

Charges and Specifications:

1. Police Officer Jacob Newman, on or about September 1, 2014, at approximately 0526 hours, while assigned to 46th Precinct and on duty, in the vicinity of 217 East Tremont Avenue, Bronx County, wrongfully used force, in that he intentionally caused physically [sic] injury to Rafael Sanchez-Perez when he struck Rafael Sanchez-Perez with a baton, without police necessity, and caused Rafael Sanchez-Perez substantial pain.
PL §120.05(2), PL §120.00(1)
P.G. 203-11 – USE OF FORCE

Appearances:

For CCRB-APU: Simone Manigo, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

For the Respondent: Craig Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, NY 10038

Hearing Date:

March 10, 2017

Decision:

Not Guilty

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 10, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Rafael Sanchez-Perez as a witness. He testified in Spanish through court translator Henry Fiol. Respondent testified on his own behalf. Video clips of portions of the incident were introduced into evidence by CCRB. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that on September 1, 2014, at approximately 0500 hours, Respondent was on duty, in uniform, in the vicinity of 217 East Tremont Avenue in the Bronx. Respondent had been called to respond to the area to assist in crowd control outside the El Divo Lounge. Police had ordered everyone out of the club and by the time Respondent arrived, there were both police and civilians in the area outside the club. One of those civilians was Rafael Sanchez-Perez. The police were arresting one person near an RMP. Police officers told the crowd to move away from that area. Some of the civilians, including Mr. Perez, were filming the police with their phone cameras. Respondent used one hand to push Mr. Perez in the chest. Subsequently, Respondent did strike Mr. Perez several times with his baton. Mr. Perez was arrested at the scene. Mr. Perez, who was "ambulatory with a steady gait," presented at the Bronx-Lebanon Hospital Emergency Room at approximately 1600 hours on September 1, 2014, complaining of pain in his right shoulder and right knee. (CCRB Ex. 1) X-rays were taken of both areas with negative results. (CCRB Ex. 1 at 4) The doctor noted abrasions to Mr. Perez's wrists and noted and diagrammed an

area of “ecchymosis” to his right lower extremity. (CCRB Ex. 1 at 7-8) [REDACTED] was prescribed and Mr. Perez was discharged to home. (CCRB Ex. 1 at 3)

As there is no dispute that Respondent hit Mr. Perez with his baton, the issue is whether that use of the baton was a wrongful use of force. CCRB has charged Respondent with intentionally causing physical injury to Mr. Perez without police necessity. CCRB’s position is that Mr. Perez was complying with the police orders to move away from the scene of an arrest and was simply recording the police action when Respondent decided to “beat him with his baton.” (Tr. 8) Respondent’s position is that the use of his baton was necessary to effectuate the arrest of Mr. Perez, after Mr. Perez hit Respondent. (Tr. 13)

Mr. Perez testified at trial that he was working as a DJ at Club Aguila from approximately 9:30, 10:00 or 11:00PM, until approximately 3:00 or 4:00AM on September 1, 2014. (Tr. 22) He stated he had one alcoholic drink at approximately 11:30PM during his time at Club Aguila. (Tr. 23) After he left Club Aguila with his wife, they went to El Divo Lounge which was about a seven minute cab ride away from Club Aguila. (Tr. 23) Mr. Perez testified that while he and his wife and two friends were inside El Divo, he had one alcoholic drink and then one sip of another one, before the police arrived and asked everyone to leave. (Tr. 24) He was told the police were there because someone had a firearm in the club. (Tr. 25, 27) He observed a lot of officers in the club before he went out to the street. (Tr. 27) Mr. Perez did not believe he was intoxicated at this time. (Tr. 27)

After leaving El Divo Lounge, Mr. Perez saw a man he knew on the ground in handcuffs. The man had been pepper sprayed and he was screaming and yelling. Mr. Perez and “everyone” else on the street took out their phones and started filming the incident. (Tr. 28) Mr. Perez testified that a police officer arrived and told the group to disperse. (Tr. 28) He heard an officer

say, "get back," and agreed on cross-examination that it was obvious to him that the police wanted everyone to leave the area. (Tr. 72) He further testified that he "kept on walking backwards but filming. And all of a sudden, a police officer came and pushed me and then he hit me with his stick on my knee." (Tr. 28) Mr. Perez testified that prior to being pushed he had not said anything or done anything to the officer. (Tr. 33) He was walking backwards away from the police, slowly, but continuously. (Tr. 72-74) Mr. Perez testified that after he was pushed, he yelled at the officer, "don't touch me." (Tr. 62) The officer who hit him did not say anything to him. (Tr. 34) Mr. Perez further stated that the officer then pushed him again as he continued walking backwards, while still filming. (Tr. 32) Mr. Perez did not capture the officer hitting his knee on the video, but testified that when he was hit the cell phone "jerked." (Tr. 34) Mr. Perez testified that after he was pushed and hit he said to the officer, "don't touch me, mother fucker." (Tr. 51, 63)

While other on-lookers were pushed by the police, Mr. Perez stated that he was the only one who was hit. (Tr. 74) Mr. Perez testified that the officer then tried to grab his hand, but was unable to, before starting to hit him all over his body. In response to a further question, Mr. Perez specified that he was hit on his back, his shoulder and the back of the neck. He testified he sustained injuries on his knee, back and shoulder. (Tr. 35) He described the pain to his knee as "strong." (Tr. 38) Mr. Perez testified that he took pictures of areas of his body the day after the incident and a picture of what he described as his left¹ knee was admitted into evidence. (Tr. 38; CCRB 4A). Also admitted into evidence were pictures Mr. Perez described as showing injuries to his shoulder (CCRB Ex. 4B); his back (CCRB Ex. 4C); and his chest and neck (CCRB Ex. 4D).

Mr. Perez testified that he did not know why the officer pushed him or hit him. The officer never said anything to him. (Tr. 43-44) While he was being hit with the baton, he was moving his

¹ It was Mr. Perez's right knee which was examined at the hospital. (CCRB Ex. 1, at 8-9)

body to try to avoid being hit. (Tr. 44) At trial, Mr. Perez demonstrated these movements as moving one shoulder up and then the other shoulder up. (Tr. 46)

On cross-examination Mr. Perez was questioned about the amount he had to drink that evening. Mr. Perez filed a civil suit based on this incident and has not received any money as the result of the suit to date. (Tr. 77-78) He was deposed under oath as a part of that suit on February 5, 2015. (Tr. 66-67) At trial, Mr. Perez testified that he did not remember if he was asked how much he had to drink during that deposition "because it has been such a long time." (Tr. 67). However, portions of the transcript of that deposition were admitted into evidence without objection. (Resp. Ex. A) The transcript indicates that Mr. Perez stated he had about four or five cognacs that night. (Resp. Ex. A)

Respondent testified that he was familiar with the area of the incident having worked in the precinct since 2003 and knew that shootings and street assaults had occurred there. (Tr. 91-92) When he arrived at the scene that morning he saw approximately 50 to 100 people exiting the club onto the sidewalk. There were also between 10 to 20 other officers there. (Tr. 92) Respondent headed to an area where he saw officers trying to arrest an individual who was on the ground. There were about 8 to 10 civilians in the area around the officers. Respondent described these individuals as being "extremely close" to the officers who were trying to make the arrest. (Tr. 93-94) Respondent testified that at that time he was concerned. He elaborated by testifying that

When the officers were bent down at the waist, a lot of their equipment on the belt was exposed like their firearm. And the civilians around the area were very close and I was afraid that -- they were being hostile. They were cheering on and everything, and I was afraid they were going to get involved in the arrest and may try to take one of the officers' firearms, or assault one of the officers, or take one of the items on their belt. (Tr. 94)

Respondent testified that he and other officers started ordering people to move and that while most of the people complied, there were still people "straggling around" after being asked to

disperse. (Tr. 94-95) Respondent first observed Mr. Perez as one of a few individuals who was still standing in the area. Mr. Perez was filming and was reaching over Respondent to do so. Respondent gave Mr. Perez a "nudge to move back." (Tr. 95-96) Respondent described his actions as placing one of his hands in Mr. Perez's chest area and moving him back. (Tr. 97) Respondent described what happened next as follows:

When I put my hand up to move him back, he took one of his hands, I don't remember which one, and he smacked me on my forearm...one time....He just cursed at me and told me not to touch him....I kept trying to move him back, and I actually I did it again, I moved him back again, then he struck me a second time. And the second time he struck me, that's when I made the decision to place him under arrest. (Tr. 97)

Respondent testified that he was arresting Mr. Perez for harassment, obstruction of governmental administration, and resisting arrest. (Tr. 105) On cross-examination counsel for CCRB brought out that Respondent, during his CCRB interview, only mentioned the harassment charge. (Tr. 124)

Respondent described his state of mind at the time Mr. Perez hit him as follows:

When he struck me, I was taken aback. I was scared and I thought this was a combative person. And he was very tall, he had a lanky build on him, he looked a little younger than me, and I thought I was a little outmatched as far as physicality was concerned. I was more scared that this situation was going to escalate given the fact he was just going to use violence against a uniformed police officer. (Tr. 98)

Respondent remembered Mr. Perez saying, "don't touch me, motherfucker," during the time he struck Respondent's arm. (Tr. 98) Respondent testified that he said, "move" to Mr. Perez. (Tr. 117)

Respondent testified that once he decided to place Mr. Perez under arrest he tried to get hold of one of his arms to handcuff it but Mr. Perez pulled away, so Respondent grabbed his shirt. Respondent further testified that once he had hold of Mr. Perez's shirt, Mr. Perez grabbed Respondent's arm and pulled Respondent towards him with a "yank." Respondent indicated that

at that point he was, "a little worried that [he] was going to get pulled down to the ground with [Mr. Perez]." He added that, "because of [Mr. Perez's] size and his strength, [he] thought [he] would be at a great disadvantage." (Tr. 99) Respondent had his baton out and started striking Mr. Perez with his baton, aiming for the area between Mr. Perez's knee and hip and for the area between Mr. Perez's shoulder and arm. (Tr. 99-100) He testified he recalled Police Academy training that baton strikes to the arms and legs were less damaging strikes. (Tr. 100)

As he was striking Mr. Perez they were both moving around and Respondent found it difficult to aim his baton to make sure he was striking Mr. Perez in the proper areas. (Tr. 100-01) He does not know exactly where his baton struck Mr. Perez. (Tr. 131) Respondent testified that while he was struggling to get Mr. Perez to the ground to handcuff him, a female ran up and hit Respondent in the head with a purse. (Tr. 101)

While Respondent was striking him, Mr. Perez never went down to the ground. He wrapped his arm around a railing as Respondent and other officers were trying to get him to let go of it. Respondent remembered that about three other officers were trying to assist him in handcuffing Mr. Perez. Respondent testified that another officer came up behind Mr. Perez and put him in a bear hug, but Mr. Perez was able to push that officer off of him. (Tr. 102) The officers eventually got Mr. Perez to the ground and placed him in handcuffs.

Respondent testified that he stopped striking Mr. Perez with his baton once Mr. Perez was pulled off the railing and was down on the ground. (Tr. 103) He described the strikes he was using against Mr. Perez as "long strikes...in a crossing motion," as opposed to full strikes. He testified that he was not putting all his strength into the strikes because there were still civilians in the area as well as his fellow officers and he did not want to hit any of those people. (Tr. 103) Respondent stated that he did not use his pepper spray for the same reason. (Tr. 104)

On cross-examination, Respondent acknowledged that when he decided to place Mr. Perez under arrest, he did not order him to turn around, or to put his hands behind his back. He also did not tell him he was about to be placed under arrest. (Tr. 127) Respondent testified that he believes he told Mr. Perez to get down on the ground. (Tr. 128)

Two video clips were admitted into evidence. (CCRB Exs. 2 and 3) The first video clip (CCRB Ex. 2 – noted as “Video One” on the disc) was recorded by Mr. Perez during a portion of the incident. In this clip, police officers can be heard telling people to move away from the area. One officer (not Respondent) is seen putting his hand on a civilian’s chest to move him back. (CCRB Ex. 2 at approx. 0:10) Respondent walks past this officer at approximately 0:24 seconds in the video. Respondent has his baton at his side and does not appear to be agitated in any way at this point. A voice can then be heard saying, “don’t touch me.” (CCRB Ex. 2 at approx. 0:27) The video does not show any actual contact between Respondent and Mr. Perez at this point, but appears to change camera position. (CCRB Ex. 2 at approx. 0:28-0:29) After that, Respondent appears to be walking towards the camera until the 0:43 second mark when again the camera changes position. The court notes that the change in camera position is not dispositive as to what happened during this limited time frame. The movement is equally supportive of both Respondent’s testimony that the camera moved when Mr. Perez hit him, as well as Mr. Perez’s version of events in which the camera moved because Respondent hit him.

The second video clip (CCRB Ex. 3 – noted as “Video Three” on the disc) is a video recorded by someone in the crowd. From the beginning of the clip until approximately 0:41 seconds, Respondent can be seen at various points walking and looking around the area. He does not appear agitated. The clip does not show the initial contact between Mr. Perez and Respondent. From approximately 1:06 to 1:18 on the video, Respondent can be seen hitting Mr. Perez with his

baton. A women approaches and appears to make contact with Respondent at approximately 1:08-09 on the video. Other officers also appear in the clip to be surrounding Mr. Perez and attempting to bring him to the ground. (CCRB Ex. 3 at approx. 1:08 until 1:20) At approximately 1:20, Mr. Perez is taken down to the ground. Respondent does not hit Mr. Perez after he is brought to the ground.

As Respondent has admitted to striking Mr. Perez with his baton, the issue in this case is whether Respondent's use of his baton in striking Mr. Perez was an improper use of force. The Court finds that CCRB has not met its burden in proving the sole charge in this case that the baton strikes were done by Respondent without police necessity.

Under Patrol Guide Section 203-11, as in effect on the date of the incident in this case, "All members of the service at the scene of a police incident must: ...Use minimum necessary force." The Guide also makes clear that, "[o]nly that amount of force necessary to overcome resistance will be used to effect an arrest...."

This Court credits the testimony of Respondent. Respondent's answers to questions were direct and without any apparent evasiveness. He testified in a very calm and controlled manner. In addition, while the Court acknowledges that the initial physical contact between Respondent and Mr. Perez is not seen in the video clips, there are no obvious discrepancies between Respondent's testimony and his actions which are seen in the video.

Mr. Perez, as opposed to Respondent, seemed less than credible in aspects of his testimony. It stretches credulity to think that Mr. Perez, approximately two and a half years after the incident, remembers he took only one sip of his second drink at the El Divo Lounge. This is even more incredible in light of the transcript from Mr. Perez's testimony under oath in February 2015, just six months after the incident, where he states he had about four or five cognacs that

night. Also, Mr. Perez's account of the incident seems like a less likely version of events. Namely, that he was one of several people taking videos of the police while simply backing away from the scene, neither saying nor doing anything to Respondent. Suddenly, he became singled out as the sole target of a series of baton strikes from Respondent, who appeared completely calm immediately preceding the strikes, and who would have known he was being filmed.

Respondent's account of events, which the Court credits as the more probable version of the incident, is that Mr. Perez struck him twice while Respondent was trying to move him back. This gave Respondent cause to arrest Mr. Perez. When he went to arrest Mr. Perez, Respondent tried to first grab Mr. Perez, a movement that Mr. Perez confirmed in his testimony. (Tr. 76) When Mr. Perez moved away, Respondent was placed in a position where it was logical for him to conclude that Mr. Perez was not willingly submitting to being arrested. Respondent had to approach Mr. Perez as he backed away to continue his efforts to place him under arrest. At this point Respondent was approaching a man who had already hit an officer two times and was clearly much larger and younger than Respondent. (CCRB Ex. 1 lists Mr. Perez's estimated height as 6' 3" and his age as 34 years old. The height discrepancy between Respondent and Mr. Perez is also clear from CCRB Exs. 2 and 3) In order to get Mr. Perez in a position to be handcuffed, Respondent made the decision that because of his disadvantage in size and age it was necessary to use some degree of force. He made the not unreasonable decision to avoid using pepper spray because there were civilians and other officers in very close proximity to Mr. Perez at the time.

The force Respondent chose to use, after Mr. Perez escaped his grasp, consisted of baton strikes. Respondent testified that he had been trained in where to land baton strikes to cause the least amount of injury. (Tr. 100) It appears from the video and even from photos taken by Mr. Perez that, despite the fact that both Respondent and Mr. Perez were in a very fluid situation in

that both were moving around quite a bit, the majority of the blows did land in, or very close to, the areas of Mr. Perez's arms and legs. (CCRB Ex. 4) CCRB Ex. 4A was described by Mr. Perez as being a bruise in his knee area. The photo shows bruising on what appears to be on the side of the leg slightly below the bend in the knee, as opposed to a blow to the knee itself. CCRB Ex. 4B was described by Mr. Perez as his arm and shoulder area. (Tr. 36-41) While Mr. Perez also testified that CCRB Ex. 4C reflected injuries to his back from a "nightstick," it is noted that he only presented to the hospital with the complaint that his shoulder and knee hurt. (CCRB Ex. 1 at 6) The hospital notes specifically indicate Mr. Perez did not present with back pain, and only his knee area and shoulder area were X-rayed with negative results. (CCRB Ex. 1 at 6, 9) In addition, the photo presented by Mr. Perez as showing injuries to his chest is not relevant to any baton strikes because Mr. Perez testified that his chest and neck pain resulted from being thrown on the ground. (Tr. 42; CCRB Ex. 4D)

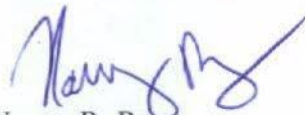
Respondent can also be considered to have used the minimum baton force necessary to make the arrest. Respondent testified that he was not putting all his strength into the baton strikes he used on Mr. Perez. This assertion is supported by the fact that Mr. Perez, while sustaining two bruises, did not suffer any broken bones or receive any treatment other than being advised to take [REDACTED] as needed. (CCRB Ex. 1 at 3) If Respondent had been using full force blows or had been aiming at more vulnerable body parts, more extensive injuries would be expected.

Respondent's actions throughout the video clips appear to the Court to be measured and controlled. He did not appear overly aggressive or agitated in any way either prior to, or after, his physical encounter with Mr. Perez. The Court does not agree with CCRB's assertion that Respondent's behavior was similar to that of an angry parent inflicting corporal punishment on an unruly child. (Tr. 147) Of noted significance in refutation of this idea, it is clear from the clips

that as soon as Respondent's stated aim of getting Mr. Perez in a position on the ground where he could be handcuffed is accomplished, there are no further baton strikes from Respondent. It is also noted that there appeared to be three other officers trying to get Mr. Perez down to the ground and Mr. Perez was initially able to just break away from one officer who had him in a bear hug. This supports Respondent's conclusion that additional measures besides just trying to drag Mr. Perez to the ground were necessary in this case.

This Court finds that CCRB has not met its burden in this case of proving that Respondent wrongfully used force in intentionally causing physical injury to Mr. Perez when he struck him with a baton without police necessity, causing Mr. Perez substantial pain. CCRB has not proven by a preponderance of the evidence that Respondent's use of the baton in this case, under these specific set of facts, failed to conform to the Patrol Guide mandate that a member of the service must use the minimum amount of force necessary to make an arrest. I therefore find Respondent Not Guilty.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

SEP 29 2017

JAMES P. O'NEILL
POLICE COMMISSIONER